No. 93-141

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WEST LYNN CREAMERY, INC., AND
LECOMTE'S DAIRY, INC.,

Petitioners,

v.

JONATHAN HEALY, COMMISSIONER,
MASSACHUSETTS DEPARTMENT OF
FOOD AND AGRICULTURE,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts

BRIEF OF MASSACHUSETTS ASSOCIATION OF DAIRY FARMERS, GORDON M. COOK, DAVID W. DUPREY, WARREN E. FACEY, DONALD LEAB, MASSACHUSETTS FARM BUREAU FEDERATION, INC. AND MASSACHUSETTS COOPERATIVE MILK PRODUCERS, INC. AS AMICI CURIAE IN OPPOSITION TO THE PETITION

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INTEREST OF THE AMICI

The Massachusetts Association of Dairy Framers (the "Association") is an unincorporated association of milk producers in Massachusetts. Messrs. Cook, Duprey, Facey and Leab are members of the Association and are owners and operators of dairy farms within the Commonwealth. Massachusetts Farm Bureau Federation, Inc. (the "Federation") is an incorporated, non-profit organization consisting of members of all segments of the Massachusetts agricultural industry, including approximately

eighty-six percent of the dairy farms in Massachusetts. Massachusetts Cooperative Milk Producers, Inc. (the "Co-op"), a non-profit corporation in Massachusetts, is a marketing cooperative of approximately seventy dairy farmers. The Association, the four individuals and the dairy farming members of the Federation and the Co-op are hereafter referred to as the "Producers."

The Producers' farms are part of the dairy industry with respect to which the Commissioner made a Declaration of Emergency in Massachusetts thus bringing into effect the Milk Pricing Order which is attacked by the Petitioners in this case. The Producers have a direct interest in sustaining the validity of the Milk Pricing Order under the Massachusetts statute in order to avoid the loss of their farms.

The Producers support the decision of the Massachusetts Supreme Judicial Court that upheld the constitutionality of the Milk Pricing Order, support the position of Respondent in this matter, and oppose the Petition for a Writ of Certiorari.[1]

SUMMARY OF ARGUMENT

> "As Commissioner of Food and Agriculture for the Commonwealth of Massachusetts I have determined that an emergency of unprecedented proportions exists within the Massachusetts dairy industry. This crisis threatens a cornerstone of our state's agricultural industry. . . ."

Commissioner's Declaration of Emergency, January 28, 1992 (pages A56 and A57 of Petitioners' Appendices, hereafter cited "Pet. App. __"). This finding, issued over 18 months ago, is itself the clearest summary of the Producers' main argument in this matter. The need of all dairy farmers in Massachusetts for an adequate price which at least approaches actual cost of production is acute. The importance of this industry to the state's

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[1] The parties have consented to the filing of this brief *amici curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

rural economy and environmental and social interests is so great that any further delay in the effectiveness of the Order cannot be justified. Since there is no discrimination against interstate commerce, and no conflict with decisions of this Court or of any United States court of appeals, the Petition should be denied.

ARGUMENT

I. THE MILK PRICING ORDER NEITHER DISCRIMINATES AGAINST OUT-OF-STATE PRODUCERS NOR RESTRICTS INTERSTATE COMMERCE

The Milk Pricing Order places an assessment on all fresh milk sold in Massachusetts. The assessment applies equally to all milk no matter where the milk is produced. It applies to milk produced in Massachusetts exactly the same as it applies to milk produced in Connecticut, New York or elsewhere. The assessment is paid pro-rata by all dealers selling in Massachusetts markets, so that there is no competitive disadvantage created among milk dealers. Moreover, because the assessment applies to milk from all sources, no incentive is created for dealers to buy milk either within or without Massachusetts. There is no competitive barrier at the borders of Massachusetts. All milk is treated alike, wherever it is produced.

Petitioners apply various pejoratives to the Milk Pricing Order, such as "economic protectionism and discrimination against competition in the Massachusetts milk market," incorrectly citing the Commissioner's own Findings in support of those allegations (Pet. 17). Such mis-characterizations are indeed necessary to the legal arguments raised by Petitioners here and throughout the history of this matter, but the fact is that the acts complained of do not operate at the level of interstate commerce. Rather, the assessment in question is imposed in Massachusetts on all fresh milk sold in Massachusetts, regardless of its source. It is exactly the system that would be implemented by a retail sales impost requiring each retailer of milk to pay to the Commissioner a stated amount per gallon sold.

No out-of-state farmer (or any other farmer) pays *anything* into the Commissioner's fund under the Milk Pricing Order. No out-of-state farm receives *anything* less for its milk under the Order. No dealer stands to save *anything* by buying milk in Massachusetts rather than in any other state. If the cost resulting from the Milk Pricing Order is not passed on to consumers, it is solely by reason of the dealer's decision to seek a competitive advantage by reducing its price as compared to other dealers.

The United States Court of Appeals for the First Circuit, in an opinion issued this month, upheld a district court's dismissal, for lack of standing, of a complaint by out-of-state milk producers seeking a declaratory judgment against the Order as violative of the Commerce Clause. *Adams v. Watson*, No. 93-1068 (1st Cir. decided August 13, 1993). The text of this decision is set out in the Appendix to this brief (hereinafter cited "App. __"). In its analysis of the actual injury alleged to be suffered by plaintiffs, the court examined the Order and its operation in considerable detail:

> "The crux of the gloomy syllogism indulged in the second amended complaint is its major premise that the pricing order creates a disincentive for Massachusetts dealers to purchase plaintiffs' out-of-state milk. Leaving aside the absence of any allegation that a decline in demand has taken place, not only does the Massachusetts regulatory scheme not provide the disincentive hypothesized by plaintiffs,[9] it *virtually ensures dealers an incentive to purchase out-of-state milk.*"

App. 9a. The footnote went on to explain:

> "The differential assessments dealers must pay into the Fund are in no manner dependent on the *actual price* the dealer pays for milk or where the milk is produced. Therefore, with the important exception noted *infra*, the pricing order does not interfere with the dealers' incentive to buy the least expensive milk available, whether produced inside or outside of Massachusetts. Thus, if out-of-state milk indeed has sold at lower price than Massachusetts milk since the pricing order became effective, as appellants allege, dealers will be motivated to buy lower-priced out-of-state milk rather than higher-priced Massachusetts milk. . . ."

Id. The exception referred to is the possibility that the Order may create an incentive for dealers to reduce net payments to Massachusetts farmers by buying less milk from them. However that may be, clearly the First Circuit Court of Appeals found no discrimination *against* foreign producers.

Repetition cannot make erroneous characterizations true. Petitioners frequently refer to the Milk Pricing Order as discriminatory and as protectionist. It does confer a benefit upon Massachusetts dairy farmers, as do many state actions designed to strengthen local industry (special real property tax exemptions, for example). In this instance, however, the effect on *commerce* between the states is neutral, since it does not distinguish between milk produced within Massachusetts and milk produced in other states.

II. THERE IS A CLEAR FACTUAL BASIS FOR THE COMMISSIONER'S FINDING OF AN EMERGENCY IN THE MASSACHUSETTS DAIRY INDUSTRY, THE CONDITION OF WHICH HAS FURTHER DETERIORATED OVER THE PAST EIGHTEEN MONTHS

Between 1980 and 1991, Massachusetts lost 48% of its dairy farms. Prices received by Massachusetts farmers for their milk in 1991 were the same as they had been in 1979. Costs of production over the same period rose dramatically: in the example of one farm the increase was approximately 400%. Today, Massachusetts dairy farmers are paid for their milk less than the cost of producing it -- by a significant margin. The continuation of this pattern will cause most if not all Massachusetts dairy farmers to go out of business and will result in the destruction of the dairy farming industry in the state.

These are the facts underlying this proceeding. Each of the foregoing statements is a finding contained in the May 20, 1991

"Report and Recommendations" prepared by a Special Commission established by the legislature to investigate and study the dairy industry in Massachusetts. These basic facts were reviewed and confirmed during hearings held in January 1992 by the Department of Food and Agriculture, Respondent herein, as summarized in its "Report Subsequent to Public Hearings" dated January 28, 1992 (Pet. App. A51). On the basis of the Department's investigation and Report, the Commissioner of Food and Agriculture issued the January 28, 1992 "Declaration of Emergency" quoted at the outset of the Summary of Argument (Pet. App. A56). Twenty-one days later, on February 18, 1992, the Commissioner published the Pricing Order (amended February 26, 1992) (*see* Pet. App. A41), which was designed to address the dairy farm crisis in Massachusetts and which has been the subject of an extensive course of litigation, including the present petition, brought by Petitioners to reverse the determination made by the Commissioner of Food and Agriculture.

Producers have participated as intervenors or as amici curiae in virtually all of the cases brought by Petitioners since the effort to stop the Milk Pricing Order was begun in February 1992. In these proceedings the Producers have attempted to bring to the various courts a first hand, ground level view of the importance of the Milk Pricing Order to their survival. Particularly in the twelve separate motions for preliminary or temporary injunctions or stays, the Producers have sought to make clear the urgency of putting the program into effect. Time is a major issue for the farmers whose livelihoods the Order was intended to help preserve. During the Petitioners' long campaign of litigation, too many additional dairy farms have gone under. For instance, on this August 27 and 28 one of the largest dairy farms in Massachusetts is going to auction: "more than 300 acres, several houses and buildings, farm machinery and 600 Holstein cattle" (*The Recorder* (Greenfield, Mass.), August 3, 1993, at 1).

Weather is critical in the economic lives of farmers. This summer the crisis in Massachusetts dairy farming has been intensified and accelerated due to the combined effects of mid-western floods and local drought. At the same time that grain

prices are increasing, Massachusetts farmers are suffering reduced corn and hay production from their own fields (*id.*). All of this has arisen after, and is in addition to, the findings of emergency in the dairy farming industry that gave rise to the Commissioner's Declaration of Emergency and Milk Pricing Order.

Petitioners state that, "The essence of the declaration was that Massachusetts dairy farmers are going out of business because they cannot compete successfully with dairy farmers in other New England states (A-53)." Pet. 6. The Commissioner has made no such finding, either at page A53 of Petitioners' Appendices or at any other place. Due to pervasive federal regulation, there is very little actual competition in the Massachusetts milk market. Indeed, because only a small percentage of fresh milk consumed in Massachusetts is produced locally, there is a premium on milk purchased out of state. *See Adams v. Watson*, App. 10a. But even with minor price variations, all New England dairy farmers are facing the same difficulty (*see* Pet. App. A57), for the problem is essentially one of actual costs continuing to increase well above the prices paid for milk in a market subject to broad federal regulation.[2]

III. UNDER THE PRECEDENTS OF THIS COURT, THE MILK PRICING ORDER IS A CONSTITUTIONAL EXERCISE OF A STATE'S POWER TO PROMOTE THE WELFARE OF ITS CITIZENS AND INDUSTRY

Petitioners attack the Milk Pricing Order solely on the ground that it is prohibited by the Commerce Clause of the Constitution:

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[2] Petitioners also speak of a "war chest" received by Massachusetts farmers under the Order, and they argue (without citation of authority) that this benefit "would dull the competitive edge of the more efficient dairy farmers in other states." Pet. 7. There is no basis for these claims in the Commissioner's findings or elsewhere in the record of this case.

> The Congress shall have Power....To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. Const. Art. I, § 8, cl.3.

From this declaration have flowed not only the array of affirmative federal powers that now reach to many aspects of interstate commerce, but also the limitations on the ability of states to impose burdens upon commerce among the states. Those limitations, arising at the intersection of federal power under the Commerce Clause and legitimate state police and taxing authority, have been considered by this Court in many cases. A broad and often cited formulation was set forth in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> "Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates even handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

Application of this standard leaves no doubt as to the propriety of the Milk Pricing Order under the Commerce Clause. The Massachusetts assessment is applied without discrimination to all milk, regardless of source; maintenance of a Massachusetts dairy farming industry is undeniably a legitimate public interest for all the reasons spelled out in the Commissioner's findings; and the effects on interstate commerce are at most incidental, since all dealers and producers are affected equally and no incentives are created for dealers to purchase milk in one state rather than another.

Indeed, it is a striking aspect of this case that Petitioners have been able to point to no burden on interstate commerce other than a few theoretical and speculative pronouncements contained in the untested affidavit of an "expert" whose principal fact prediction,

that the Order will increase the amount of milk produced in Massachusetts, was disproved by actual events during the limited time the Order was enforced. Even if he had been right, increased production is exactly the goal of the Milk Pricing Order. A state program of support for local industry is not made unconstitutional by its success; it is made unconstitutional by a showing that it improperly burdens interstate commerce. The expert did not address this issue.

The legitimacy of the purposes of the Milk Pricing Order has long been recognized by this Court, even in cases relied upon by Petitioners:

> No one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry. However, the Commerce Clause stands as a limitation on the means by which a State can constitutionally seek to achieve that goal.

Bacchus Imports, Ltd. v. *Dias*, 468 U.S. 263, 271 (1984). And more specifically:

> "The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description *in connection with the State's regulation of interstate commerce*. Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition; discriminatory taxation of out-of-state manufactures does."

New Energy Co. v. *Limbach*, 486 U.S. 269, 278 (1988).

The *Limbach* distinction between direct state action in support of local industry and such action taken in the course of regulating interstate commerce provides the rationale for not only the present case but also for the only decision of this Court relied upon by Petitioners in their claim that "The Decision Below Conflicts With Prior Decisions Of This Court. . ." (Pet. 16). That case is *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), which was decided before the institution of the federal milk price regulatory

program that largely eliminated price competition among dairy farmers within the same region.

The New York law in *Baldwin* prohibited the sale in New York of milk produced in other states unless the price paid was not less than that required to be paid to New York producers. The statute effectively eliminated price competition across state lines. Other than a simple import duty, there could be no clearer example of state regulation of interstate trade, and accordingly the law was found to violate the federal Commerce Clause.

As distinguished from the scheme in *Baldwin*, the Massachusetts Milk Pricing Order has no direct impact on interstate commerce. It is not a state support or subsidy effected "in connection with the State's regulation of commerce" since the state does not regulate in any way the movement of any milk. Rather, it is an effort by Massachusetts to assist its dairy industry by wholly internal action, an assessment on all Class I milk *sold in* Massachusetts.[3]

The Milk Pricing Order fits into the category of essentially local action approved in *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346 (1939), and *Opinion of the Justices*, 601 A.2d 610 (Me. 1991). In both of those cases the respective courts acknowledged the local interest sought to be served by the regulatory scheme in question, and in both cases the courts found that operation of the state action was essentially local while the impact on interstate commerce was merely incidental.[4] The

[3] The regulatory scheme in the present case bears superficial similarity to that of the Agricultural Adjustment Act's processing tax found unconstitutional in *United States v. Butler*, 297 U.S. 1 (1936). *Butler*, however, involved the scope of the taxing power granted to the Federal government by Art. I, section 8, of the Federal Constitution, and found the processing tax to be outside that power. The Commerce Clause was "put aside as irrelevant" to the Court's decision, since federal and not state action was in question. 297 U.S. at 64.

[4] The United States District Court for the District of Maine has just upheld the validity of a statute of Maine which is essentially the same as the Milk Pricing Order involved in this case. *Cumberland Farms, Inc. v. LaFaver*, Civ. No. 92-70-P-H, (D. Me. decided August 3, 1993).

Massachusetts Milk Pricing Order is essentially indistinguishable from a state farm extension program, or reduced state taxes for grains and feeds, or state financial support for industrial parks (as by the issuance of tax free bonds or the granting of tax concessions), or the efforts of New York City to retain its private financial institutions with various public economic incentives. As the Commerce Clause does not distinguish among forms of commerce, dairy farmers are entitled to the same benefits of state support as are granted regularly and without question to other commercial undertakings. From the perspective of the Commonwealth, a decision in favor of Petitioners here would mean simply that Massachusetts has no power to support its dairy industry with a uniform imposition on the sale of milk within the state.

The broader Constitutional principles enunciated in the *Eisenberg Farm Products* decision are also important in the present case. In approving state police power regulation of commerce flowing across state lines, Justice Roberts described some of the operative underlying issues:

> "The United States could not exist as a nation if each of them were to have the power to forbid imports from another state, to sanction the rights of citizens to transport their goods interstate, or to discriminate as between neighboring states in admitting articles produced therein. . . . But in matters requiring diversity of treatment according to the special requirements of local conditions, the states remain free to act within their respective jurisdictions until Congress sees fit to act in the exercise of its overriding authority. . . . Every state statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens

> interstate commerce. . . .These principles. . . not only are inevitable corollaries of the constitutional provision, but their unimpaired enforcement is of the highest importance to the continued existence of our dual form of government.

306 U.S. at 351-2 (footnote omitted).

IV. THE DECISION BELOW IS NOT IN CONFLICT WITH DECISIONS OF UNITED STATES COURTS OF APPEALS

Petitioners assert that the decision below is in conflict with two federal cases: *Marigold Foods* v. *Redalin*, 809 F. Supp. 714 (D. Minn. 1992), and *Farmland Dairies* v. *McGuire*, 789 F. Supp. 1243 (S.D.N.Y. 1992). Those cases involve state laws or regulatory schemes that reach into the stream of interstate commerce and affect directly the interstate purchase of milk by dealers as opposed to its sale within a single state. Moreover, no United States court of appeals has spoken as to either decision. Neither reflects a conflict between the decision below and decisions of United States courts of appeals. *Marigold Foods* was a ruling on plaintiffs' motion for a preliminary injunction, and the court applied the usual balancing test in which the possibility of irreparable harm to the respective parties, the probability that plaintiffs would prevail on the merits, and issues of the public interest were examined. There was no final decision, even at the trial court level, on the validity of the Minnesota statute and regulations complained of by plaintiffs.

Even if *Marigold Foods* were a decision of a United States court of appeals, it would not warrant grant of the Petition in the present matter. The regulatory scheme considered in that case set prices which dairy processors -- *i.e.*, dealers -- in Minnesota were required to pay for milk purchased in other states. This is the same arrangement as had been disapproved in *Baldwin v. G.A.F. Seelig*, the determination by one state of the price that must be paid for goods being imported from another state. As such, it constitutes intervention directly in the conduct of interstate commerce by the imposition of a regulatory scheme that eliminates any possibility of interstate price competition. The Massachusetts Order, on the other hand, does not seek to control

the price at which milk is purchased from producers either within or without the Commonwealth; rather, it imposes an assessment on the *sale* of milk *in* Massachusetts to Massachusetts consumers, without any discrimination as to the source of the milk.

Farmland Dairies v. *McGuire*, is similar to *Baldwin v. G.A.F. Seelig*, except that New York there sought to eliminate competition by requiring dealers to pay into a fund the difference between New York milk prices and those paid to out of state producers (789 F. Supp. at 1248). Again, the result was that the possibility of any price competition across state lines was eliminated, for however low the foreign prices went, the payment would be increased to keep the cost of acquisition of milk constant. In the *Limbach* analysis, this is not only state action designed to support local industry, but it was taken "in connection with the State's regulation of interstate commerce" -- that is, the direct and immediate regulation of the degree of price competition between producers within and without the state.

The Massachusetts Milk Pricing Order erects no barrier to trade or competition. No milk is barred from the Commonwealth, and no discrimination is made between local and foreign milk in the levying of the assessment. The Order operates equally as to all milk and solely at the local level, *i.e.*, at the point of *sale* in Massachusetts, without any reference to where the milk originally was purchased or at what price. The recent decision of the First Circuit in *Adams v. Watson*, discussed at pp. 4-5, *supra*, and set forth in the Appendix to this brief, fully supports the position of these amici in the present case.

In the absence of any direct barrier to interstate commerce, and of any conflict with any decision of this Court, or of a United States Court of Appeals, this is not a proper case for a grant of certiorari.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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August, 1993

APPENDIX

Opinion of the United States Court of Appeals for the First Circuit in *Adams v. Watson*, decided August 13, 1993

United States Court of Appeals for the First Circuit

No. 93-1068

KENNETH ADAMS, SETH BUNKER AND RODNEY HUDSON, *ET AL.*,

Plaintiffs, Appellants,

v.

GREGORY WATSON AS COMMISSIONER, MASSACHUSETTS DEPARTMENT OF FOOD AND AGRICULTURE, *ET AL.*,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Rya W. Zobel, *U.S. District Judge*]

Before
Selya, *Circuit Judge*,
Campbell, *Senior Circuit Judge*,
and Cyr, *Circuit Judge*.

Michael L. Altman with whom *Margaret A. Robbins and Rubin E. Rudman* were on the brief for appellants.

Eric A. Smith, Assistant Attorney General, with whom *Scott Harshbarger*, Attorney General, was on the brief for Commissioner of the Massachusetts Department of Food and Agriculture.

Robert J. Sherer with whom *Francis A. DiLuna and Roche, Carens & DeGiacomo* were on brief for Massachusetts Farm Bureau Federation, Inc.

August 13, 1993

CYR, *Circuit Judge*. Plaintiffs-appellants, dairy farmers from New York and New Hampshire, instituted the present civil rights action against the Commissioner of the Massachusetts Department of Food and Agriculture ("Commissioner") for declaratory and injunctive relief from the alleged unconstitutional enforcement of a Massachusetts milk pricing order. The district court dismissed their complaint for lack of standing. We affirm.

I.

BACKGROUND

On January 28, 1992, the Commissioner declared a state of emergency in the Massachusetts dairy industry, based on findings that rising production costs and flat dairy prices were devastating the industry.[1] The Commissioner determined that a price stabilization system was necessary. The pricing order issued by the Commissioner on February 26, 1992, forms the focus of this appeal.

The pricing order established a "Dairy Equalization Fund" ("Fund"), into which each licensed milk distributor ("dealer") in Massachusetts is required to pay monthly assessments ("differential assessments") equal to one-third of the amount by which the $15 price set by the pricing order exceeds the applicable federal minimum or "blend" price per hundredweight

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[1] In 1991, for example, $12.64 per hundredweight ("cwt") was the average milk price paid Massachusetts dairy farmers, whereas their average production cost was $15.50 per cwt -- an average loss of $2.86 per cwt.

("cwt").[2] The differential assessment applies to all milk sold in Massachusetts by licensed dealers, whether produced in Massachusetts or elsewhere.[3] Notwithstanding the fact that dealers must pay the differential assessment calculated on all out-of-state and in-state produced milk, out-of-state producers, who supply most of the milk sold in Massachusetts, are not entitled to any disbursements from the Fund. The monies in the Fund are distributed monthly among *Massachusetts milk producers only*, in direct proportion to their sales to dealers, subject to a monthly payment cap to each Massachusetts producer equal to the differential assessment on 2000 cwt. Excess monies in the Fund are refunded to the dealers in direct proportion to their payments into the Fund. No Fund monies are withheld for program administration costs. The pricing order prohibits dealers from "unconscionably" increasing their milk prices to offset the differential assessments the dealers are required to pay into the Fund.

Plaintiffs-appellants, out-of-state producers, sell their entire milk production to West Lynn Creamery, Inc., a licensed Massachusetts milk dealer. Their original civil rights complaint demanded a judicial declaration that the pricing order is violative of the Commerce Clause,[4] requested the return of all Fund

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[2] The United States dairy industry is regulated by an extensive federal pricing system. The Secretary of Agriculture promulgates federal milk marketing orders, pursuant to the Agricultural Marketing Agreements Act of 1937, 7 U.S.C. § 601, *et seq.*, which establish minimum milk prices. The marketing order in effect in Massachusetts is New England Federal Milk Marketing Order No. 1 ("Order No. 1"). *See* 7 C.F.R. § 1001. The minimum milk price ("blend price") is calculated monthly, using a marketwide weighted average of the value of all milk sold during the preceding month.

[3] The complaint states that Massachusetts produces only 10% of the milk sold in the state.

[4] Commerce Clause violations may be redressed under 42 U.S.C. § 1983. *See Dennis v. Higgins*, 498 U.S. 439, 443-51 (1991).

monies previously disbursed to Massachusetts producers, and sought to enjoin further enforcement of the pricing order.

The first amended complaint contained generalized allegations of competitive injury and economic harm.[5] On defendants' motion, the district court dismissed the first amended complaint, finding its "general allegations of economic harm . . . unsupported by any specific, factual allegations of injury . . . ."[6] *Adams v. Watson*, No. 92-11641-Z, 1992 U.S. Dist. LEXIS 19306, at *4 (D. Mass. 1992). The district court appropriately noted that there was no allegation that the plaintiffs were selling less milk in Massachusetts, unable to undersell their Massachusetts competitors, or receiving a lower price as a result of the pricing order.

The district court denied, apparently as futile, plaintiffs' motion to amend their first amended complaint by adding two paragraphs for the stated purpose of alleging "with greater specificity 'injury in fact' to meet the requirement of more 'specific, factual

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[5] Two nonproducer plaintiffs (milk *dealers*) voluntarily dismissed their claims following the Commissioner's motion to dismiss the original complaint. The remaining plaintiffs, appellants here, filed the first amended complaint, which dropped the dealer plaintiffs from the action and withdrew a claim for damages.

West Lynn Creamery, Inc., an original plaintiff, brought a separate state court action challenging the pricing order. On April 15, 1993, the Massachusetts Supreme Judicial Court ruled that the pricing order did not violate the Commerce Clause. *See West Lynn Creamery, Inc. v. Comm'r of Dep't of Food and Agric.*, 415 Mass. 8, 611 N.E.2d 239 (1993).

[6] The first amended complaint merely alleged that the pricing order "has the same effect as a 'customs duty' or 'protective tariff' on the importation of milk produced in other states," "subsidizes Massachusetts farmers which causes the disorderly marketing of milk," causes out-of-state farmers, including plaintiffs, to suffer economic harm and competitive disadvantage because it subsidizes Massachusetts farmers, and may force out-of-state farmers, including plaintiffs, out of business.

allegations of injury.'"[7] The district court summarily denied the ensuing motion for relief from judgment under Fed. R. Civ. P. 60.

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[7] The two new paragraphs in the proposed second amended complaint allege:

> . . . a) the plaintiffs are denied the opportunity to profit from their ability to sell milk in Massachusetts at prices below the Massachusetts fixed minimum price of $15/cwt (in the months of June and July, 1992, for example, out-of-state milk was selling for approximately $12.50/cwt, $2.50/cwt less than the fixed minimum price of Massachusetts milk);
>
> b) the Pricing Order purposely creates a disincentive for dealers to purchase out-of-state milk, which has sold at a lower price (at least $2/cwt lower) than Massachusetts milk since the Pricing Order went into effect; and
>
> c) but for the protectionist structure of the Pricing Order, the plaintiffs would be able to undersell the Massachusetts dairy farmers.
>
> The plaintiffs, and all out-of-state dairy farmers, have been and will be further "injured in fact" by the Pricing Order as follows:
>
> a) the effect of the Pricing Order is to reduce the flow of raw milk into Massachusetts from out-of-state because the retail price increase to consumers (caused by a portion of the assessment being passed on as price increases to consumers) reduces the demand for milk;
>
> b) as the demand in Massachusetts decreases, out-of-state milk is displaced because of the preference given to locally produced milk;
>
> c) as out-of-state milk is displaced, the blend price received by dairy farmers falls (the Pricing Order only shields Massachusetts dairy farmers from this price decline);
>
> d) Massachusetts dairy farmers have and will produce more milk as a result of the higher price that they receive for milk from the Pricing Order;
>
> e) as the supply of Massachusetts milk increases, out-of-state milk is displaced because of the preference given to locally produced milk; and
>
> f) as the demand for out-of-state milk in Massachusetts decreases from the effects of the Pricing Order, the premiums (the amount paid by milk dealers to dairy farmers above the federal minimum price) are undermined.

II.

DISCUSSION

The doctrine of standing "serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Although considered by many to be among the more confused doctrines in federal law, Erwin Chemerinsky, *Federal Jurisdiction* § 2.3.1 (1989); *see also* Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 221 (1988) ("the structure of standing law . . . has long been criticized as incoherent"); *see, e.g., Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471-76 (1982); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 151 (1970), the jurisprudence of standing is based on certain fundamental principles. *Whitmore*, 495 U.S. at 155. The requirement of "standing" is "founded in concern about the proper -- and properly limited -- role of the courts in a democratic society" and involves "both constitutional limitations on federal court jurisdiction and prudential limitations on its exercise.[8] *Warth v.*

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[8] Prudential limitations on the exercise of federal jurisdiction -- self-imposed rules of judicial restraint -- may be invoked even if all constitutional essentials are present. As the Supreme Court has acknowledged, however, "it has not always been clear in the opinions of [the] Court whether particular features of the 'standing' requirement have been required by Art. III *ex proprio vigore*, or whether they are requirements that the Court itself has erected and which were not compelled by the language of the Constitution." *Valley Forge*, 454 U.S. at 471. Nonetheless, at least three prudential principles bear importantly on "standing". First, the litigant must assert its own legal rights and interests, not those of third parties. *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Second, claimants with "generalized grievances" shared by a large class of citizens raising "abstract questions of wide public significance" normally will be denied standing, as such questions are more appropriately addressed to the representative branches of government. *Valley Forge*, 454 U.S. at 475. Finally, the claim presented must come within "the zone of interests to be protected or

Seldin, 422 U.S. 490, 498 (1975).

In its constitutional formulation, the doctrine of standing is the gatekeeper of justiciability: Article III of the Constitution limits federal "judicial power" to the resolution of "cases and "controversies," *see* U.S. Const. Art. III; only if it is presented with a "case or controversy" may an Article III court entertain an action. *Warth*, 422 U.S. at 498. *See United States v. AVX Corp.*, 962 F.2d 108, 113 (1st Cir. 1992). The "irreducible constitutional minimum of standing" entails three elements:

> First, the plaintiff must have suffered an "injury of fact -- an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be "likely" as opposed to merely "speculative," that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992) (citations and internal quotation marks omitted); *see also Northeastern Fla. Chapter of Assoc. Gen. Contractors of Am. v.*

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regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 153.

In the instant case, appellees have not suggested that the appellant producers are asserting rights and interests other than their own; the complaint does not allege a "generalized grievance" more appropriately addressed to another branch of government; and appellants, as milk producers who ship in interstate commerce, would appear to be within the "zone of interests" protected by the Commerce Clause, *see Dennis*, 498 U.S. at 449 (Commerce Clause was intended to benefit those involved in interstate commerce and is the source of a right of action on the part of those injured by state regulation of commerce) (citing *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 320 n.3 (1976).

Jacksonville, 113 S. Ct. 2297 (1993); *AVX*, 962 F.2d at 113; *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 424 (1st Cir. 1983). The responsibility for "clearly and specifically set[ting] forth facts sufficiently to satisfy the Article III standing requirements" rests with the claimant. *Whitmore*, 495 U.S. at 155-56; *see also Defenders of Wildlife*, 112 S. Ct. at 2136; *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990); *Warth*, 422 U.S. at 518; *AVX*, 962 F.2d at 114.

Like the trial court, we "accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth*, 422 U.S. at 501; *see AVX*, 962 F.2d at 114. Nevertheless, we do not "credit bald assertions, [or] . . . unsubstantiated conclusions, . . ., nor . . . honor subjective characterizations, optimistic predictions, or problematic suppositions." *Id.* at 115 (citations and internal quotation marks omitted). "'[E]mpirically unverifiable' conclusions, not 'logically compelled, or at least supported, by the stated facts,' deserve no deference." *Id.* (quoting *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 16 (1st Cir. 1989)). Within this analytic framework, we examine appellants' claims.

Appellants contend that the first amended complaint was sufficient to demonstrate standing at the pleading stage, as specific facts need not be pleaded in support of general allegations of economic injury, and allegations of competitive harm have been found sufficient to satisfy the Article III standing requirements. Moreover, even if the first amended complaint was deficient, appellants argue, the second amended complaint corrected each deficiency identified by the district court. We are unable to agree with either contention. First, the allegations in the first amended complaint are too vague, generalized, and conclusory to plead cognizable economic injury or competitive harm. Second, close inspection reveals that the more particularized allegations proposed in the second amended complaint are not only conclusory, conjectural, and speculative, but illusory as well. We begin our analysis with the proposed second amended complaint.

The crux of the gloomy syllogism indulged in the second amended complaint is its major premise that the pricing order creates a disincentive for Massachusetts dealers to purchase plaintiffs' out-of-state milk. Leaving aside the absence of any allegation that a decline in demand has taken place, not only does the Massachusetts regulatory scheme not provide the disincentive hypothesized by plaintiffs,[9] it *virtually ensures dealers an incentive to purchase out-of-state milk.*

Appellants overlook what may have been an inadvertent (but certainly significant) incentive under the pricing order for Massachusetts dealers to purchase as much milk as possible from out-of-state producers. The monies paid into the Fund by the dealers are disbursed *only* to Massachusetts producers, not to out-of-state producers. The monies remaining in the Fund after the Massachusetts producers have received their disbursements are *refunded* to the dealers. Thus, the less milk the dealers buy from Massachusetts producers, the more money remains to be redistributed among the dealers after the Massachusetts producers have been paid. The complaint evinces no competent allegation

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[9] The differential assessments dealers must pay into the Fund are in no manner dependent on the *actual price* the dealer pays for milk or where the milk is produced. Therefore, with the important exception noted *infra*, the pricing order does not interfere with the dealers' incentive to buy the least expensive milk available, whether produced inside or outside of Massachusetts. Thus, if out-of-state milk indeed has sold at a lower price than Massachusetts milk since the pricing order became effective, as appellants allege, dealers will be motivated to buy lower-priced out-of-state milk rather than higher-priced Massachusetts milk.

We recognize that plaintiffs likely intended to allege not that out-of-state milk has sold at a price lower than that for Massachusetts milk, but that it has sold at a price lower than the $15 per hundredweight yield Massachusetts producers will have realized once they have received their Fund disbursements. Essentially, this simply restates the allegation that the pricing order places out-of-sate producers at a competitive disadvantage because it subsidizes Massachusetts producers, a contention we address later in the opinion. *See infra* at pp. 14-19.

which would warrant the counterintuitive presumption that the dealers would act contrary to their own economic interests. Thus, other than pure conjecture and speculation, or conclusory theory, nothing in the proposed second amended complaint suggests that the pricing order will not *increase* dealer demand for out-of-state milk.

The second amended complaint further alleges that the protectionist structure established by the pricing order prevents plaintiffs from underselling their Massachusetts competitors. This anti-competitive scenario is based on the unstated assumption that out-of-state producers would attempt to sell their milk to Massachusetts dealers at prices below those paid Massachusetts producers when in fact, as the complaint elsewhere indicates, out-of-state milk historically has commanded *premium prices* in Massachusetts because in-state producers can meet only a small percentage of the state's demand for milk. This assumption is not only unstated, but plaintiffs allege no facts which could conceivably support it. As there is no suggestion that the pricing order will materially affect Massachusetts' status as an import state, *see supra* note 3, there is no rational basis for the conjectural assumption that out-of-state milk will cease to command a premium price. Moreover, the pricing order provides ample inducement for dealers to continue to pay a premium for out-of-state milk in order to realize larger refunds from the Fund. Thus, plaintiffs' assumption is belied by the overriding economic reality discussed above: dealers are not required to buy milk from Massachusetts producers and doing so bids fair to disadvantage the dealer financially, for the reasons already explained. So long as the dealer has an alternate out-of-state milk supply, the Massachusetts producer is a relatively unattractive source.

The two remaining allegations in the second amended complaint likewise depend on the faulty premise that the pricing order creates dealer disincentives to buy out-of-state milk. First, the complaint alleges that plaintiffs are denied the opportunity to profit from their ability to sell their milk in Massachusetts at prices below $15 per cwt. Since the pricing order in no manner

prevents plaintiffs from selling their milk for less than $15 per cwt., we presume that plaintiffs intend to suggest that the challenged order may hinder their efforts to *increase their Massachusetts sales* by capitalizing on their ability to sell milk for less than $15 per cwt. For all that appears in the complaint, however, the net effect of the pricing order will be to foster rather than hinder out-of-state milk sales in Massachusetts, independently of any efforts by plaintiffs to bolster sales.

Second, the proposed second amended complaint forecasts the following scenario: (1) dealers will pass some portion of their differential assessments on to consumers in the form of retail price increases, causing a decrease in demand for milk in Massachusetts; (2) out-of-state milk will be displaced "because of the preference given to locally produced milk," (3) the federal blend price will fall, and the pricing order will shield only Massachusetts producers from the price decline; (4) Massachusetts farmers will produce more milk, displacing out-of-state milk because of the preference given to locally produced milk; and (5) as the demand for out-of-state milk decreases, the premiums paid to out-of-state producers will be undermined. Once again, however, the scenario portrayed in the second amended complaint is illusory, as it fails to take into account the strong financial incentive for dealers to purchase more out-of-state milk. Indeed, so long as dealers can recoup a greater portion of their differential assessments from the Fund by buying more out-of-state milk, there will be *less* pricing-order related costs to be passed on to consumers.

Therefore, shorn of their "problematic suppositions" and "[e]mpirically unverifiable conclusions, [neither] logically compelled, [n]or . . . supported," *AVX*, 962 F.2d at 115 (internal quotation marks omitted), the supplemental allegations of threatened injury propounded in the second amended complaint fail to demonstrate "injury in fact," the core "standing" requirement forming the basis for the district court's denial of the motion to amend.

Finally, we turn to appellants' contention that the more general allegations in the first amended complaint demonstrated standing. There can be no question that competitive harm may constitute "injury in fact" for standing purposes. The *Rental Housing Ass'n* v. *Hills*, 548 F.2d 388, 390 (1st Cir. 1977) (there is "no authority for the proposition that competitive harm is an insufficient allegation of injury in fact; [q]uite the contrary, the cases finding allegations of competitive injury sufficient are legion"); *see also Inv. Co. Inst.* v. *Camp*, 401 U.S. 617 (1971) (investment companies had standing as competitors to challenge ruling by the Comptroller of the Currency authorizing national banks to operate collective investment funds); *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970) (travel agents had standing as competitors to challenge ruling by the Comptroller of the Currency that national banks may provide travel services); *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 152 (sellers of data processing services had standing to challenge ruling by Comptroller of the Currency that national banks may offer data processing services; injury in fact requirement met by allegations that competition by national banks might entail some future loss of profits and that respondent bank was preparing to perform data processing services for two of plaintiffs' customers); *Simmons* v. *ICC*, 900 F.2d 1023, 1026 (7th Cir. 1990) (finding competitive injury sufficient to satisfy the injury in fact requirement of standing), *cert. denied*, 111 S. Ct. 1308 (1991); *Bullfrog Films, Inc.* v. *Wick*, 847 F.2d 502 (9th Cir. 1988) (same), *cert. denied*, 111 S. Ct. 1308 (1991); *Peoples Gas, Light & Coke Co.* v. *U.S. Postal Serv.*, 658 F.2d 1182, 1194 (7th Cir. 1981) (same); *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130, 138 (D.C. Cir. 1977) (distinct and palpable competitive injury is injury in fact for standing purposes even if economic injury is small in magnitude), *cert. denied*, 434 U.S. 1086 (1978).

The core allegation in the first amended complaint is that "[t]he [p]ricing [o]rder places out-of-state farmers, including the plaintiff farmers, at a competitive disadvantage because it subsidizes Massachusetts farmers, but not-out-of-state farmers, all of whom are selling milk in Massachusetts." Although we assume that this

allegation does not depend on plaintiffs' unfounded assumption that the pricing order will create a disincentive for dealers to purchase out-of-state milk, we cannot ignore the obverse reality that it overlooks the fact that the pricing order bids fair to *increase* dealer demand for out-of-state milk. Therefore, to that extent at least, the direct subsidy to Massachusetts producers is negated; that is, to the extent that dealers buy more out-of-state milk, there will be less subsidy paid Massachusetts producers. Moreover, aside from the inadequate amendments proposed in the second amended complaint, *see supra* at pp. 9-13, plaintiffs make no attempt to explain or demonstrate *how* the pricing order subsidy to Massachusetts producers will inflict economic *injury* or competitive *harm* upon plaintiffs, particularly in light of the strong financial incentives for dealers to buy more, rather than less, out-of-state milk, even at premium prices, in furtherance of their own economic self-interest and in response to the market reality that Massachusetts is almost totally dependent on out-of-state milk. It is simply insufficient, under any acceptable pleading standard, to rely on conclusory allegations based on pessimistic predictions and "problematic suppositions" that are both unexplicated and illusory. *See AVX*, 962 F.2d at 115.

We therefore agree with the district court conclusion that the first amended complaint was insufficient to assert "standing":

> The fact that the [p]ricing [o]rder provides funds to Massachusetts farmers and not to out-of-state farmers does not, as plaintiffs suggest, establish that they have standing to challenge the [o]rder as invalid *per se* under the Commerce Clause. Instead, plaintiffs must allege facts to support their claim that the provisions of the [o]rder are discriminatory in purpose or effect *and that they, specifically, have suffered injury as a result*. Even reading the complaint in a light most favorable to plaintiffs, they fail to meet this burden.

Adams, 1992 U.S. Dist. LEXIS 19306, at *6 n.4.

Although the challenged pricing order provides a direct subsidy to one group of producers, and not to another group, absent plausible allegations that the supposed injury to plaintiffs is "(a)

concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical," *Defenders of Wildlife*, 112 S. Ct. at 2136 (internal citations and quotation marks omitted), it cannot be *presumed* that a subsidy will inflict cognizable economic injury or competitive harm upon the plaintiff group.

The first Circuit rule on pleading "standing" requires "heightened specificity." *AVX*, 962 F.2d at 115; *see also Munoz-Mendoza*, 711 F.2d at 425 ("[w]here 'injury' and 'cause' are not obvious, the plaintiff must plead their existence in his complaint with a fair degree of specificity"). We recognize the potential tension between our standard and the Supreme Court's nascent disaffection for certain heightened pleading standards developed in other contexts. *See Leatherman* v. *Tarrant Co. Narcotics Intelligence & Coordination Unit*, 113 S. C. 1160 (1993) (federal courts may not apply heightened pleading standard in actions alleging municipal liability under 42 U.S.C. § 1983; heightened standard is in direct conflict with Fed. R. Civ. P. 8). There is no such tension in the present context, however, as the first amended complaint does not meet the pleading standards adopted in this circuit for *ordinary* cases--that is, for cases in which we have never imposed a "heightened" pleading standard. *See generally Boston & Me. Corp.* v. *Hampton*, 987 F.2d 855 (1st Cir. 1993) (containing extensive discussion of pleading requirements in this circuit and elsewhere) (Keeton, J.).

In an ordinary civil case, a motion to dismiss may be granted only if the complaint, viewed in the most flattering light, shows no set of facts which would entitle the plaintiff to relief. *Gooley* v. *Mobil Oil Corp.*, 851 F.2d 513, 514 (1st Cir. 1988); *see AVX*, 962 F.2d at 115 (describing *Gooley* as an "ordinary case"). As noted in *Gooley*, however, "*minimal requirements are not tantamount to nonexistent requirements*." 851 F.2d at 514. "Subjective characterization, devoid of a minimally sufficient factual predicate," simply does not suffice to "drag a defendant past the pleading threshold." *Id.* at 515; *see Resolution Trust Corp* v. *Driscoll*, 985 F.2d 44, 48 (1st Cir. 1993) (explaining that while factual allegations in a complaint are assumed to be true when a court is passing upon a motion to dismiss, this tolerance

does not extend to "legal conclusions" or to "bald assertions."); *see also Boston & Me.*, 987 F.2d at 863-64 (citing cases). Judge Keeton recently identified at least three rationales for requiring a *minimal degree* of particularity at the pleading stage:

> First, a complaint that is too general will not "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." [*Conley* v. *Gibson*, 355 U.S. 41, 47 (1957)]. Accordingly, some distinction must be made between an adequate complaint and one that is too general. Second, rising litigation costs (and the associated impact of an improper threat of litigation) speak for requiring some specificity before permitting a claimant to "drag a defendant past the pleading threshold." *Gooley*, 851 F.2d at 515; *see also [Correa-Martinez* v. *Arrillaga-Belendez*, 903 F.2d 49, 53 (1st Cir. 1990)]; *New England Data Services, Inc.* v. *Becher*, 829 F.2d 286, 289-91 (1st Cir. 1987). Third, the burgeoning caseload crisis in the district courts weighs in favor of earlier disposition of baseless claims. *See [Sutliff, Inc.* v. *Donovan Co., Inc.*, 727 F.2d 648, 654 (7th Cir. 1984)].

Id. at 865.

The present case is not "ordinary," however, as the district court dismissed the plaintiffs' complaint under Fed. R. Civ. P. 12(b)(1) for lack of jurisdiction. Federal courts "are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'" *FW/PBS*, 493 U.S. at 231 (quoting *Allen* v. *Wright*, 468 U.S. 737, 750 (1984)). Although the Court recently suggested that, in the standing context, "[a]t the pleading stage, general *factual* allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim[,]'" *Defenders of Wildlife*, 112 S. Ct. at 2137 (quoting *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 889 (1990)) (emphasis added), the Court has also explained that "[i]t is a long-settled principle that standing cannot be inferred argumentatively from averments in the pleadings, but

rather must affirmatively appear in the record." *FW/PBS*, 493 U.S. at 231 (citations and internal quotations omitted). Our cases are not to the contrary. *See, e.g., AVX*, 962 F.2d at 115 ("Because standing is fundamental to the ability to maintain a suit," the complainant's burden to "clearly alleg[e] facts sufficient to ground standing" cannot be satisfied by "purely conclusory allegations or by a Micawberish reading of a party's generalized averments;" rather, the complainant must "set forth reasonably definite factual allegations, either direct or inferential, regarding each material element needed to sustain standing."). In the present case, plaintiffs have presented no *factual* allegations to support their standing to bring the present action under any minimally acceptable pleading standard; rather, their complaint is filled with contradictory hypotheses and conclusory allegations. As appellants failed to set forth any plausible allegations of "injury in fact," despite ample opportunity to do so, the district court properly dismissed their motion to amend as futile.

Affirmed.